Sobehah bt Che Wan v Bank Pertanian Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(A)-377–03 OF 2020
YAACOB MD SAM, DARRYL GOON AND GHAZALI CHA JJCA
20 JULY 2023

Land law — Charge — Sale of land — Chargor applied to set aside sale of charged property on ground it was sold below market value ('MV') — Chargor argued that chargee's valuation report showing gross diminution in MV of property from time charge was created seven years earlier was fishy — Whether facts showed chargor never challenged chargee's MV during previous interlocutory proceedings and even negotiated settlement based on chargee's MV — Whether chargor could not blow hot and cold on the issue — Whether chargor failed to adduce evidence that chargee's valuation was fraudulent or that chargee had behaved mala fide — Whether reason for disparity in valuation was because chargee's valuer had considered negative elements affecting the property whereas chargor's valuer had not considered them

The appellant had charged her property to the respondent as security for two business loans. At the time the charge was created, the appellant's valuer had valued the property's market value ('MV') as RM650,000 and the forced sale value ('FSV') as RM488,000. The respondent obtained an order for sale of the property when the appellant defaulted in repaying the loans. When the respondent applied to court for directions for the conduct of the sale, the respondent's valuer had given the property a MV of only RM350,000 and a FSV of RM250,000. The first auction was called off when the parties agreed to settle the matter amicably. When the proposed settlement did not work out, the respondent applied for fresh directions from court to proceed with a second auction. The successful bidder at the auction paid the full purchase price of RM350,000 and signed the contract of sale. The appellant applied to court to set aside the sale, inter alia, on the ground that the auction reserve price was grossly below the MV. The High Court found no fraud or mala fide conduct on the part of the respondent and dismissed the application. In the instant appeal against the decision, the appellant's main complaints were that: (a) the respondent had acted mala fide in selling the property at an undervalue; and (b) the respondent had failed to serve the relevant cause papers on the appellant.

Held, unanimously dismissing the appeal:

(1) Although the valuation reports respectively commissioned by the appellant and the respondent were quite similar as they had taken into

account the locality, amenities and services of the said property and its surrounding circumstances and both reports had employed the same comparison methodology by referring to the previous/recent transactions of sale, the respondent's valuation report had additionally taken into account the negative elements of the said property and had made adjustments for time, location, frontage, tenure, size, shape and negative features. The appellant's valuation report was less objective or neutral compared to the respondent's valuation report (see paras 44–45 & 52).

(2) The appellant had not adduced any evidence to show that the respondent's valuation report was procured fraudulently or recklessly or how the valuation of the MV and FSV of the property had contributed to a breach of duty or fraudulent conduct on the part of the respondent (see paras 49 & 53).

(3) Although at first blush, the appellant's argument appeared plausible that it made no sense for the MV of the property to have dropped from RM650,000 (at the time the charge was made) to RM350,000 some seven years later, it had to be noted that not all properties would appreciate in value. The condition and circumstances affecting a property had to be given due consideration, as in the present case where the respondent's valuer had considered certain negative elements affecting the property in question (see paras 50–51).

(4) The MV and FSV of the property were made known to the appellant as early as the first application for the order for sale. The appellant could have challenged the valuation then but she did not do so. In fact, the appellant negotiated a proposed settlement based on the respondent's valuation. In the circumstances, she could not blow hot and cold with regards to the issue (see paras 54–55).

(5) The appellant had not convinced this court as to why the respondent would want to fabricate a lower MV for the auction sale or what it stood to gain by doing so. The application to set aside the auction sale was, in the circumstances, untenable (see paras 56–57).

(6) The court was satisfied that the respondent had served all relevant cause papers on the appellant and an affidavit of service to that effect had been filed and served. There was no basis for saying that the appellant was not aware of the hearing date. All procedures were duly observed. The sale was completed and the respondent had duly received the purchase price from the successful bidder. This was not a case where the orders relating to the sale of the property ought to be set aside as they did not suffer from any defects. There was no error in the finding of facts and law in the High Court judge's decision (see paras 58–61).

[Bahasa Malaysia summary

Perayu telah mencagarkan hartanahnya kepada responden sebagai cagaran untuk dua pinjaman perniagaan. Ketika waktu cagaran itu dibuat, penilai perayu telah menilai harga pasaran hartanah tersebut ('HP') sebanyak RM650,000 dan harga jualan paksaan ('HJP') sebanyak RM488,000. Responden telah memperoleh perintah jualan hartanah tersebut ketika perayu telah gagal membayar hutangnya. Ketika responden memohon arahan mahkamah mengenai proses jualan, penilai responden telah menilai HP sebanyak RM350,000 dan HJP sebanyak RM250,000 sahaja. Lelongan pertama telah ditarik balik kerana pihak-pihak bersetuju untuk membuat penyelesaian. Ketika penyelesaian yang dicadangkan tidak berjaya, responden memohon arahan mahkamah yang baharu untuk proses jualan lelongan. Pembida yang berjaya telah membayar harga lelongan sebanyak RM350,000 dan menandatangani perjanjian jualan. Perayu memohon kepada mahkamah untuk mengenepikan, antaranya, atas alasan harga rizab jualan adalah dibawah nilai HP. Mahkamah Tinggi mendapati bahawa tiada unsur penipuan atau mala fide di pihak responden dan menolak permohonan tersebut. Di dalam rayuan ini terhadap keputusan tersebut, alasan utama perayu adalah: (a) responden telah bertindak secara mala fide ketika menjual hartanah itu di bawah harga pasaran; dan (b) responden telah gagal menyerahkan kertas-kertas kausa berkaitan kepada perayu.

Diputuskan, sebulat suara menolak rayuan:

(1) Walaupun laporan-laporan penilaian oleh perayu dan responden adalah lebih kurang sama memandangkan ianya mengambilkira faktor ketempatan, kemudahan dan perkhidmatan mengenai hartanah tersebut dan keadaan-keadaan persekitaran dan laporan-laporan penilai itu turut membuat kaedah perbandingan dengan mengambilkira transaksi jualan terdahulu/terkini, namun laporan penilaian responden telah menambah elemen-elemen yang negatif dengan membuat penyesuaian dengan masa, lokasi, buka depan, tempoh, saiz, bentuk dan ciri-ciri negatif. Laporan penilaian perayu kurang objektif atau neutral berbanding laporan penilaian responden (lihat perenggan 44–45 & 52).

(2) Perayu tidak mengemukakan sebarang keterangan yang menunjukkan laporan penilaian responden dibuat secara penipuan atau secara cuai atau bagaimana penilaian HP dan HJP hartanah tersebut yang menyumbang kepada pelanggaran tugas atau perbuatan penipuan oleh responden (lihat perenggan 49 & 53).

(3) Walaupun jika dilihat pada mulanya, hujahan perayu seperti boleh diterima yang menyatakan adalah tidak masuk akal HP hartanah tersebut telah menurun dari RM650,000 (ketika cagaran itu dibuat) kepada RM350,000 pada tujuh tahun kemudian, adalah perlu diberi perhatian bahawa tidak semua hartanah akan meningkat harga

pasarannya. Keadaan dan persekitaran mempengaruhi nilai hartanah dan ianya harus diambilkira, sepertimana di dalam kes ini yang mana penilai responden telah meneliti elemen-elemen negatif yang mempengaruhi nilai hartanah tersebut (lihat perenggan 50–51).

(4) HP dan HJP hartanah tersebut telah diberitahu kepada perayu ketika permohonan kali pertama untuk perintah jualan dibuat. Perayu sepatutnya mencabar penilaian tersebut tetapi tidak berbuat demikian. Malah, perayu telah berunding mengenai penyelesaian yang dicadangkan berdasarkan penilaian responden. Oleh itu, dia tidak boleh mengambil sikap tidak endah mengenai isu ini (lihat perenggan 54–55).

(5) Perayu tidak meyakinkan mahkamah ini tentang mengapa responden dikatakan mereka nilai HP yang rendah untuk perintah jualan dan apa yang responden peroleh jika berbuat sedemikian. Permohonan untuk mengenepikan perintah jualan, di dalam keadaan kes, tidak boleh dipertahankan (lihat perenggan 56–57).

(6) Mahkamah ini berpuas hati dengan responden bahawa semua kertas-kertas kausa berkaitan telah diserahkan kepada perayu dan afidavit penyerahan tekah difailkan dan diserahkan. Tiada asas untuk mengatakan perayu tidak mengetahui tarikh pendengaran. Kesemua prosedur telah dilakukan. Jualan tersebut telah dilaksanakan dan responden telah menerima harga jualan daripada pembida yang berjaya. Ini adalah bukan satu kes jualan hartanah yang sepatutnya diketepikan kerana mereka tidak mengalami sebarang kerugian. Tiada kesalahan mengenai dapatan fakta dan undang-undang di dalam keputusan Mahkamah Tinggi tersebut (lihat perenggan 58–61).]

Cases referred to

Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd [1992] 2 MLJ 504, HC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Jitender Singh a/l Pagar Singh & Ors v Pentadbir Tanah Wilayah Persekutuan and another appeal [2012] 1 MLJ 56; [2012] 2 CLJ 165, CA (refd)

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119, SC (refd)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)

Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422, SC (refd)

Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662, CA (refd)

Mustapha bin Mohamed (as the receiver and manager of Sykt Ji Seng Hong Plastic Manufacturing Sdn Bhd) v Ji Seng Hong Plastic Manufacturing Sdn Bhd (Ng Bak Soon & Ors, petitioners) [2014] 11 MLJ 793, HC (refd)

Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35, FC (refd)

A *Seema Jaya Sdn Bhd & Anor v CIMB Bank Berhad* [2015] MLJU 1969; [2015] 8 CLJ 1047, HC (refd)
Siland Sdn Bhd & Anor v M & J Frozen Food Sdn Bhd & Anor [1990] 2 MLJ 502, HC (refd)

B **Legislation referred to**
National Land Code s 257

Appeal from: *Sobehah binti Che Wan v Bank Pertanian Malaysia Berhad* [2020] MLJU 831 (High Court, Kuala Lumpur)

C
Balbir Singh (with Daniel Ong) (K Y Thong & Co) for the appellant.
Jeyanthini Kannaperan (with Pauline) (Shearn Delamore & Co) for the respondent.

D **Yaacob Md Sam JCA:**

INTRODUCTION

E **[1]** This is our unanimous decision for this appeal against the learned High Court judge's decision in dismissing the amended originating summons to, inter alia, set aside an order for sale and/or in the alternative, an order for damages to be made in favour of the appellant against the respondent.

F **[2]** After considering counsels' full submission at great length, both oral and written, we dismissed the appeal.

[3] We provide our reasons herein below.

G AGREED BACKGROUND FACTS

[4] The common agreed background facts submitted by parties in their submissions and the ground of judgment by the learned High Court judge are condensed and set out below.

H

[5] The appellant had procured two business loans from the respondent secured by way of a third party charge over a property belonging to the appellant.

I **[6]** To facilitate part of the charge process, the property was valued by the valuer, Kumpulan Nilai Sdn Bhd, on 24 June 2011 at market value ('MV') RM650,000 and the forced sale value ('FSV') at RM488,000.

[7] The charge dated 7 September 2011 bearing the Presentation No 761/2011 over the said property was filed in the land office. A

[8] The borrower however defaulted in the repayments for the loan to the respondent. B

[9] An order for sale of the said property was then obtained by the respondent on 28 August 2017 to recover the outstanding loan.

[10] Directions to sell the said property was duly obtained on the 25 June 2018. C

[11] The said property was valued by the respondent's valuer, Messrs WM Malik & Kamaruzaman at a market value of RM350,000 and a forced sale value of RM250,000. D

[12] Amid the auction, there were negotiations between the appellant and respondent to redeem the said property. One of the terms proposed by the respondent was that the appellant had to pay RM100,000 and to bear the auctioneers and valuation fees of RM3,000 to which the appellant had agreed and complied with. The auction was then called off. E

[13] Later the appellant informed the respondent that the appellant had found a buyer for appellant's property in Kedah and the appellant would utilise part of the proceeds to redeem the said property. F

[14] However, no final settlement made by the appellant. The respondent filed a fresh application on 8 October 2018 to obtain directions to proceed with the order for sale. G

[15] The auction was held on 21 November 2018 and a successful bidder, Mohd Fauzi bin Ibrahim completed and signed the contract of sale. The full purchase price of RM350,000 was paid to the respondent. H

[16] The dispute between the appellant and respondent then began by the appellant's amended originating summons in the High Court to seek for, inter alia:

(a) a declaration that the order dated 19 October 2018 was invalid; I

(b) a declaration that the order dated 16 April 2018 was invalid and therefore liable to be set aside;

(c) an order dated 19 October 2018 be set aside; and

(d) further and in the alternative, the respondent be ordered to pay the appellant the sum of RM360,000 being the differential sum of the actual market value and the auctioned value.

THE HIGH COURT DECISION

[17] The learned High Court judge dismissed the appellant's application premised on the following reasonings.

[18] To sum up, the learned judge found that:

(a) the appellant's valuer's report had not detailed or provided reasons for its valuation of the said property as compared to the respondent's valuation report; and

(b) there was no mala fide conduct on the part of the respondent as the respondent had informed the appellant of its intention to proceed with the order for sale in the event the appellant failed to redeem the property within the agreed timeline. This can be seen in the contemporaneous correspondences exchanged between the parties.

[19] Aggrieved by the learned High Court's decision, the appellant filed this appeal.

THE APPELLANT'S SUBMISSION

[20] The complaints raised by the appellant were as follows:

(a) that the respondent had acted in bad faith in proceeding with the second order for sale and had even failed to inform and serve the appellant the cause papers; and

(b) the said property was auctioned at an under-value (which was RM350,000) and the respondent intentionally sold it at this value just to cover the outstanding loan due and owing to the respondent.

[21] We shall now discuss the appellant's submission in detail.

The said property was valued below the market price and suspicious conduct of valuer and bank

[22] Learned counsel for the appellant referred to three different valuation reports, of which two were prepared by the appellant's appointed valuer whereas one was prepared by the respondent's valuer.

[23] The values in these reports are set out in the table below:

No	Summary of Valuation Report	Date
1	Valuation 1 Prepared by Kumpulan Jurunilai Sdn Bhd MV: RM650,000 FSV: RM488,000	17 June 2011
2	Valuation 2 Prepared by WM Malik & Kamaruzaman MV: RM350,000 FSV: RM250,000	22 November 2017
3	Valuation 3 Prepared by Nilai Harta MV: RM650,000	22 November 2017
4	Valuation 4 Prepared by Icon Capital Property (Subang Jaya) Sdn Bhd MV: RM680,000	22 November 2017
5	Valuation 5 Prepared by Icon Capital Property (Subang Jaya) Sdn Bhd MV: RM710,000	21 November 2018

[24] The appellant's counsel submitted that there was an obvious breach of duty and mala fides on the part of the respondent in intentionally auctioning the said property at an under-valued.

[25] The case of *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422 was cited wherein the court held that:

> As it was a common ground that the order for sale aforesaid had neither fixed the auction date nor stipulated the amount actually due under the charge, as required by s 257(1)(b) and (c) of the Code, respectively, we invited counsel on both sides to argue, as a preliminary point of law, the question of what the legal consequences of such non-compliance were.
>
> At the conclusion of the argument, we were unanimously of the opinion, that the provision of s 257(1)(a) to (d) were mandatory, and as the order for sale in the present case had suffered from the defects herebefore mentioned, it was thereby invalidated.

[26] Learned counsel for the appellant further contented that the respondent had acted with wilful blindness when it had commissioned a report in 2011 that valued the said property at RM650,000 and when some seven years later, the said property was valued at RM350,000. On this ground, the valuer had acted in bad faith against the appellant.

[27] To this end, the appellant referred the court to *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 which relevant excerpt is as follows:

> It is equally settled law that in order for the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgement or decree: *Halsbury's Laws of England* (4th Ed, Vol 16), para 1519. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree.
>
> In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither res judicata nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.
>
> Accordingly, we find that the learned judge was in error when he held that the appellant was estopped, inter alia, by res judicata, from raising in the subsequent action the identical issues which he had raised in the foreclosure proceedings.

[28] To compound matters, the respondent had not served and informed the appellant of the fresh application on the directions of the order for sale and thereby prejudicing the interest of the appellant.

[29] Finally, the appellant relied on *Siland Sdn Bhd & Anor v M & J Frozen Food Sdn Bhd & Anor* [1990] 2 MLJ 502 and *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 which held that the court may set aside a sale when it has been conducted fraudulently, improperly and/or in contravention of the term of the order for sale.

THE RESPONDENT'S ARGUMENT

[30] The contrary arguments raised by the respondent, on the other hand, are that the order for sale was properly and legally conducted.

[31] The components of the respondent's arguments are as follows:

(a) that the appellant was aware of the reserved price of RM350,000 of the said property during the first auction on 16 April 2016 — this is because the appellant was present;

(b) the appellant, knowing the reserved price of RM350,000 proposed the settlement sum to redeem the said property from the respondent;

(c) a few attempts were made by the appellant in redeeming the said property; the proposals were rejected by the respondent;

(d) the respondent had served the notice of application and its affidavit for the second application for auction direction on the appellant at the same addresses. An affidavit of service was affirmed and filed to reflect the service;

(e) in this respect, the hearing date was duly informed to the appellant; and

(f) the valuation report presented by the appellant did not take into account the negative feature of the said property.

[32] Learned counsel for the respondent referred to a plethora of authorities to support its arguments. See amongst others:

(a) *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331;

(b) *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662;

(c) *Seema Jaya Sdn Bhd & Anor v CIMB Bank Berhad* [2015] MLJU 1969; [2015] 8 CLJ 1047; and

(d) *Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd* [1992] 2 MLJ 504.

OUR DECISION

[33] After hearing the submissions of the appellant and the respondent, the primary issue for determination before this court was whether the order for sale is valid as the auction price was lower than the market value based on the valuation reports.

[34] In s 257 of the National Land Code, it provides that:

(1) Every order for sale made by the Court under section 256 shall be in Form 16H and shall —

(a) provide for the sale to be by public auction;

(b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;

(c) specify the total amount due to the chargee at the date on which the order is made;

(d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question;

(e) ...

(f) ...

A **[35]** In determining the auction price, as in the present case, it is necessary to refer to the valuation report provided by the professional valuers. Often, the dispute arises at this point when there are different valuations from different valuers.

B **[36]** In cases where there are two different valuations, it is incumbent upon the court to refer to the methodology employed by the valuers coupled with various objective factors taken into account in deriving such values.

C **[37]** In the present case, the appellant relied on its valuation reports (dated 17 June 2011) which supported the market value and forced sale value at RM650,000 and RM488,000 respectively.

[38] On the other hand, the market value and forced sale value of the said D property appear to be much lower than the valuations by the appellant based on the respondent's valuer's report namely at RM350,000 and RM288,000.

[39] This is the core of the argument; that the respondent had fraudulently secured the order of sale for the said land at an under-valued price.

E

[40] So, the question is: *had the respondent breached its duty when it auctioned the property at an under-valued price?*

F **[41]** In the case of *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 at p 37, the court explain 'market value' to be:

> First, market value means the compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have G to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both the vendor to sell and the purchaser to buy at the market price without any element of compulsion. Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Thirdly, its H potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future eg the possibility of it being used for building or other developments. Fourthly, in considering the nature of the land regard must be given as to whether I its locality is within or near a developed area, its distance to or from a town, availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future, expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should not be given unless it is supported by, or coincides with, other evidence.

> The safest guide is evidence of sales of similar lands of similar quality or position in the locality at or prior to the time of acquisition. The prices paid for such sales can be used as comparables.

[42] To this end, the respondent's counsel argued that the respondent had taken 'reasonable precautions' to sell and realise the property at a price reflective of its market value at the time of such sale.

[43] The respondent's counsel argued that the respondent had taken the necessary steps in obtaining the valuation report by engaging the valuer's service, Messrs WM Malik & Kamaruzaman who has properly inspected, assessed and evaluated the value of the said property.

[44] Both valuers reports appeared to be quite similar as they had taken into account the locality, amenities and services of the said property and its surrounding circumstances. Both employed the same comparison methodology by referring to the previous/recent transaction of sale. However, a cursory comparison of the reports reveal that the valuation report prepared by Messrs WM Malik & Kamaruzaman, indicates that the valuer, in addition, took into account the negative elements of the said property.

[45] This glaring feature in the valuation report seems to show that the valuation report of the appellant was less objective or neutral compared to the respondent's valuation. We can understand that the appellant's valuer would want to optimise the market value of the said property for the appellant.

[46] In the case of *Jitender Singh a/l Pagar Singh & Ors v Pentadbir Tanah Wilayah Persekutuan and another appeal* [2012] 1 MLJ 56; [2012] 2 CLJ 165, the Court of Appeal held that:

> [24] After careful consideration of the impugned provisions and art 13 of the Federal Constitution as well as the submissions presented before us, we are of the view that limiting the discretion of a High Court judge hearing a Land Reference to the opinion of the assessors appointed to assist him, alternatively, by the opinion of one of the assessors, does not infringe art 13 of the Federal Constitution. We are of the opinion that such a provision is valid and of full legal effect. In our considered opinion the limitation requiring him to be guided by such an opinion is warranted as a High Court judge is no expert in determining the value of land. Valuation of land clearly is not a mathematical process. In particular, potential development value is not often easy to determine in the absence of an abundance of evidence from recent transactions in respect of comparable properties. Almost invariably there emerges from the consideration of all of the facts a fairly well-defined range, sometimes blurred at either end within which the answer must lie. The opinion of those of equal competence and experience may well tend to indicate different point within that range. Ultimately, it is a matter of opinion and experience. Thus, the requirement that the amount of compensation to be awarded is to be based on an

opinion given by the experts in this particular field (ie, a valuer), in determining the market value of the land that had been acquired and the amount of compensation to be awarded in our view is well-founded.

[47] See also *Mustapha bin Mohamed (as the receiver and manager of Sykt Ji Seng Hong Plastic Manufacturing Sdn Bhd) v Ji Seng Hong Plastic Manufacturing Sdn Bhd (Ng Bak Soon & Ors, petitioners)* [2014] 11 MLJ 793, it was held that:

> I also agree that the opinion given by a valuer as regard to the valuation of the assets is merely a guide to the applicant and the valuation given doesn't bind the applicant since the sale as put in the open market. The Court of Appeal's in the case of *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662 where Mahadev Shanker JCA at p 670 had said that:
>
> > The true commercial value of property is not what any valuer thinks it should be. But the actual price that property will fetch when it is put up for sale in the open market ...

See also *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 662.

[48] At this stage, it is really not for this court to re-assess the details of the valuation reports by the valuers. In fact, it is for the appellant to convince this court of the alleged fraud, how it was committed or how the respondent had breached its duty in securing the order for sale. We found that the learned High Court judge had fully comprehended and appreciated all the details in the valuation reports.

[49] Accordingly, with respect, we failed to find merit to the appellant's argument how the valuation of the market value and forced sale value by the respondent's valuer contributes to a breach of duty or any fraudulent conduct on the part of the respondent.

[50] When the appellant argued that a valuation for the said property at the time of the charge is RM650,000 and some seven years later the value drops to RM350,000 did not make sense, and at first blush, this argument may appear plausible. Nevertheless, it must however be noted that not all property appreciates in value. The condition of the property must be given due consideration. Every property, with its own special renovation and maintenance bears its own value.

[51] In the present case, the respondent's valuer had considered the negative elements of the said property. This is mentioned in its report.

[52] The valuation report by Messrs WM Malik had duly explained how it arrives at its valuation via its letter dated 13 June 2019 by taking into account the market value of the property and made adjustment for 'time, location,

frontage, tenure, size, shape and negative features':

> The subject property has a narrow road frontage which is a narrow strip (for access road) extending to the main portion of the land at the rear. It also have a negative feature because the main portion of the land faces the rear and side boundaries of the adjoining lots.
>
> We have relied on Sale 1 (Lot PT 4571) in the valuation of the subject property which has transacted at RM134.00 per square foot because it is adjacent to the subject property but fronting the same road. The sale is adjusted for time to get RM140.60 per square foot. The subject property is valued at RM65.00 per square foot after allowing a discount at about 55% for all factors mentioned in the above.

[53] With respect, the appellant has not convinced this court that the valuation report was obtained fraudulently or recklessly, to say the least. No single shred of evidence to show that the respondent or its valuation report was procured through fraud.

[54] Additionally the market value and the forced sale value of the said property was made known to the appellant as early as the first application for an order for sale. The appellant had the opportunity to challenge the valuation during the first application if she genuinely believed the said property was under-valued. However, she did not do so. The appellant went on to discuss the proposed settlement by referring and relying on the respondent's valuation.

[55] In this respect, we find the appellant cannot blow hot and cold and only wanted to rely the respondent's valuation for her own benefit.

[56] The appellant, with respect, had not convinced this court on why the respondent wanted to fabricate a lower market value to merely fit the outstanding debt owing to the respondent or how the respondent would gain from fabricating a lower sum.

[57] Hence to set aside the order for sale merely on its complaint of the value when the appellant was made known of the market value simply does not hold water and is untenable.

[58] In addressing the issue of not disclosing the new hearing date for the second application for direction for order for sale, we are unable to accede to the appellant's argument. We are satisfied that the cause papers were duly served on the appellant and an affidavit of service to that effect had been filed and served. The order for sale here did not suffer from any defects as in *Maimunah bte Megat Montak v Mayban Finance Bhd*.

[59] The sale was completed and the respondent had duly received the purchase price from the successful bidder. This is simply not the case where the order ought to be set aside for failure to observe the procedure of the order for sale. No element or proof of fraud has been adduced to the court.

[60] There is no basis for maintaining that the appellant was not aware of the hearing date.

CONCLUSION

[61] Based on the foregoing, it is our unanimous decision that the appellant had failed to show any merit to the appeal. The learned High Court judge had fully appraised and appreciated the arguments and the relevant contemporaneous documents. There is no error in the finding of facts and law in the learned High Court judge decision.

[62] We accordingly dismiss the appeal as appellate intervention is not warranted.

[63] Costs to the respondent is ordered in the sum of RM5,000, subject to allocator.

Appeal dismissed.

Reported by Ashok Kumar